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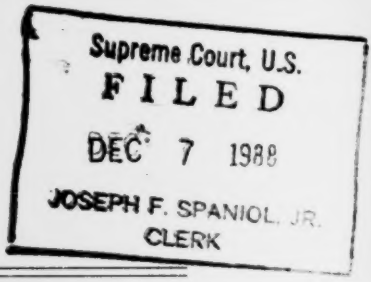

No. _____

In The
Supreme Court of the United States
October Term, 1988

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CRAWFORD PAINTING & DRYWALL COMPANY,
Petitioner,

v.

J. W. BATESON, INC.,
Respondent.

--o--

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX

--o--

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY FAILING TO ACCORD PROPER DEFERENCE TO THE JURY'S FINDINGS AND THEREBY DEPRIVE PETITIONER OF ITS SEVENTH AMENDMENT RIGHT OF TRIAL BY JURY?

2. WHETHER THE COURT OF APPEALS RENDERED A DECISION THAT IGNORES ESTABLISHED PRECEDENT, AND CREATES A SPLIT AMONG THE CIRCUITS, BY EXTENDING THE APPLICATION OF A "NO DAMAGES FOR DELAY CLAUSE" FAR BEYOND ITS APPROPRIATE SCOPE?

3. WHETHER THE COURT OF APPEALS' DECISION THAT A PRIME CONTRACTOR ON A FEDERAL CONSTRUCTION PROJECT HAS NO DUTY TO DISCLOSE VITAL INFORMATION TO A SUBCONTRACTOR DEPARTS FROM ESTABLISHED PRECEDENT, CREATES A SPLIT AMONG THE CIRCUITS, AND GENERATES CONFUSION WITHIN THE CONSTRUCTION INDUSTRY?

PARTIES TO THE PROCEEDING

All parties to the proceedings below subject to this petition for writ of *certiorari* are set forth in the caption of the case.

RULE 28.1 LISTING

The Petitioner, Crawford Painting & Drywall Company, is a sole proprietorship.

TABLE OF CONTENTS

	page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 28.1 LISTING	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
OPINIONS AND PROCEEDINGS OF THE COURTS BELOW	1
STATEMENT OF JURISDICTION	4
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT	12
I. THE COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY FAILING TO ACCORD PROPER DEFERENCE TO THE JURY FINDINGS AND THEREBY DEPRIVED CRAWFORD OF ITS SEVENTH AMENDMENT RIGHT OF TRIAL BY JURY.....	12
A. The Court of Appeals Disregarded the Jury's Findings and Substituted Its Own Findings of Fact....	14

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH ESTABLISHED PRECEDENT OF THE STATE OF TEXAS, THE FIFTH CIRCUIT, AND WITH THE VARIOUS CIRCUITS CONCERNING THE APPROPRIATE SCOPE OF A "NO DAMAGES FOR DELAY CLAUSE"..... 21

III. THE COURT OF APPEALS' DETERMINATION THAT A PRIME CONTRACTOR ON A FEDERAL CONSTRUCTION PROJECT HAS NO DUTY TO DISCLOSE VITAL INFORMATION TO A SUBCONTRACTOR DEPARTS FROM ESTABLISHED PRECEDENT, CREATES A SPLIT AMONG THE CIRCUITS, AND GENERATES CONFUSION WITHIN THE CONSTRUCTION INDUSTRY..... 26

A. The Decision of the Court of Appeals Generates Confusion in the Construction Industry and Erodes Confidence in the Administration of Federal Contracts... 26

B. The Court of Appeals Created a Split Among the Circuits By Holding that a Prime Contractor May Keep Secret Schedules and Abandon the Scheduling Requirements of the Contract..... 28

CONCLUSION..... 30

APPENDICES.....

TABLE OF AUTHORITIES

Cases:

Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981)..... 25

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 359 (1962)..... 12, 13

Campbell v. Booth, 526 S.W.2d 167 (Tex. Civ. App. 1975)..... 18

City of Houston v. R.F. Ball Const. Co., Inc., 570 S.W.2d 75 (Tex. Civ. App. 1978)..... 22, 23, 26

E. C. Ernst, Inc. v. Manhattan Constr. Co. of Tex., 551 F.2d 1026, 1029 (5th Cir. 1977), reh'g denied in part, granted in part, 559 F.2d 268 (5th Cir. 1977); cert. denied 434 U.S. 1067 (1978)..... 22

Fortec Constructors v. United States, 8 Cl. Ct. 490 (1985), aff'd, 804 F.2d 141 (Fed. Cir. 1986)..... 29

Gallick v. Baltimore & Ohio R.R., Inc., 372 U.S. 108 (1963)..... 12

G.M. Shupe, Inc. v. United States, 5 Cl. Ct. 662 (1984)..... 29

Mortensen v. United States, 322 U.S. 369 (1944)..... 13

Owens Corning Fiberglas Corp. v. United States, 419 F.2d 439 (Ct. Cl. 1969)..... 28

Park v. El Paso Board of Realtors, 764 F.2d 1053 (5th Cir. 1985).. 20

Shintech Inc. v. Group Constructors, Inc., 688 S.W.2d 144 (Tex. App. 14 Dist. 1985)..... 22, 23

Southeastern Financial Corp. v. United Merchants & Mfrs., 701 F.2d 565 (5th Cir. 1983)..... 19

Susanoil, Inc. v. Continental Oil Co., 519 S.W.2d 230 (Tex. Civ. App. 1975)..... 19

Tenant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 (1944)..... 13, 14

United States v. Blair, 321 U.S. 730 (1943)..... 28

United States v. F.D. Rich Company, Inc., 439 F.2d 895 (8th Cir. 1971)..... 30

United States Steel Corp. v. Missouri Pacific Railroad, 668 F.2d 435 (8th Cir. 1982)..... 22

Western Co. of N. Am. v. United States, 699 F.2d 264 (5th Cir. 1983); cert. denied, 104 S. Ct. 237 (1983)..... 20

Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100 (1969)..... 12

STATUTES

18 U.S.C. § 1961 et seq..... 1

OPINIONS AND PROCEEDINGS IN THE COURTS BELOW

In March of 1985, Petitioner Crawford Painting & Drywall Company ("Crawford"), a subcontractor, filed suit in the United States District Court for the Western District of Texas against Respondent, J.W. Bateson, Inc. ("Bateson"), a general contractor, seeking recovery for damages Crawford incurred on a Federal contract for the construction of a United States Air Force Hospital. Federal jurisdiction was founded upon Civil RICO, 18 U.S.C. § 1961 et seq.

After five weeks of trial, the case was submitted to the jury. Following eight (8) days of deliberation, the jury found that Bateson committed multiple acts of fraudulent concealment and non-disclosure of vital project information, and found Bateson liable for fraud,

breach of contract, negligence, and breach of fiduciary relationship. The jury's verdict included an award to Crawford for damages and attorneys fees totalling $7,384,241.33.

On January 22, 1987, the District Court entered an order and a judgment for Crawford based upon the jury verdict. On April 28, 1987, the District Court denied Bateson's motions for new trial, altered judgment, remittitur, and judgment notwithstanding the verdict. The Judgment and the Orders of the District Court are set out in the Appendices.

Bateson appealed to the United States Court of Appeals for the Fifth Circuit. On August 10, 1988, the Court of Appeals entered an unpublished Memorandum Decision reversing the judgment for Crawford and dismissing the entire cause of action. On September 8, 1988, the Court of

Appeals denied Crawford's Request for Rehearing by the Panel, and Suggestion For Rehearing En Banc. The Memorandum Decision and the Order denying rehearing are set out in the Appendices.

STATEMENT OF JURISDICTION

The Memorandum Decision ("Mem. Dec.") of the United States Court of Appeals was entered on August 10, 1988. The Court's Order denying a rehearing by the panel and a rehearing en banc was rendered September 8, 1988.

A writ of *certiorari* is sought from this Court pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Constitution Amendment VII - Civil Trials

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

In 1976, the U.S. Army Corps of Engineers ("the Corps") awarded the Respondent Bateson a $64.9 million contract ("the prime contract") for the construction and renovation of Wilford Hall, a U.S. Air Force Hospital in San Antonio, Texas. In 1977, Bateson entered into a subcontract ("the subcontract") with Crawford for the drywall work on the project. Crawford's work originally was scheduled for completion within four years, i.e., by 1981.

Under the terms of the subcontract, which incorporated by reference the provisions of the prime contract, Bateson was required to notify Crawford of Corps-directed changes in the time and scope of the prime contract work in order to allow Crawford to assess the impact to its own work. (Ex. 58, Paragraph 6). The

subcontract also required Bateson to coordinate the work of all subcontractors; to maintain a project schedule based upon the critical path method ("CPM") of scheduling; and allowed Crawford the right to submit claims to the Corps, through Bateson, for additional compensation from the Corps (Ex. 58).

Bateson disregarded these duties by failing to disclose $12 Million in Corps-directed contract changes which greatly increased Crawford's direct and indirect costs of performance. (R. II 43-44; 54-55; 286-90; VIII 184-85, 188; IX 139; P.Ex. 44, 450, 450A; Jury Interrogatory No. ("Inter. No.") 3(2), 7(D)). Bateson likewise failed to coordinate the work of its subcontractors, resulting in increased labor costs due to congestion, access difficulties, and job delay. (R.

II 14, 56; VII 245-46, 257-58; VIII 180-85).

Although the contract required Bateson to maintain a schedule based upon the critical path method ("CPM"), Bateson abandoned the CPM and instead provided bar charts to its subcontractors. (R. V 341-42). These bar charts were inaccurate, short term, and covered limited areas of the work. (R. II 94-95; VIII 200-02, 243).

The adverse impact of these contractual failures on Crawford was magnified because Bateson maintained secret schedules for the performance of work, thus depriving Crawford of the ability to determine the true nature and extent of the changes being ordered by the Corps. (R. IV 175-76; V 342-45, 414-15, 418-19; P.Ex. 471; Inter. No. 3(3)). Crawford thus was unable either to plan its work

efficiently or determine what its costs would be to perform work affected by Corps-directed changes.

CONTRACT MODIFICATION P00253

In 1978, the Corps threatened to impose liquidated damages on Bateson for delays in the completion of the different phases of the work. (R. II 66-77; V 374-77; VI 157-59). In exchange for relief from liquidated damages, and without consulting Crawford or providing it an opportunity to price changes already directed to its work, Bateson entered into Rephasing Bilateral Modification P00253 ("P00253"). (R. II 149-61; P. Ex. 15 at 35-36). P00253 had two primary effects: (1) it extended the project for two years and totally rephased the activities and time sequences for the general contractor and

the subcontractors (R. VI 159, 271-72; P. Ex. 8); (2) it released any and all claims of Bateson and its subcontractors for contract changes predating the modification in the progress of the work. Id. After the Corps issued a notice to proceed with the rephasing, Bateson returned an executed copy of P00253, accompanied by a letter which purported to reserve Crawford's right to pursue the costs of delay relating to a 148 day time extension. Any direct costs incurred by Crawford in performing Corps-directed changes prior to the date of the Modification were waived. (P. Ex. 13).

Pursuant to a company policy in effect at the time of contracting, Bateson concealed P00253, its release language, and all other time extensions granted by the Corps during the entire contract period. (R. VII 97, 110-14). Bateson

further misrepresented to Crawford in 1979 that it was behind schedule, compelling Crawford to incur substantial additional acceleration costs, resulting in severe cash shortages. (R. II 37-38, 91-92, 131; III 317-20; VI 19; VIII 20607; P. Exs. 15 at 35-36, 446, 447 and 377B).

In 1982, Bateson represented to its subcontractors that claims could be asserted against the Corps and persuaded them to enter into a written agreement ("the Liquidation Agreement") to present such claims to the Corps as part of an "omnibus claim." (R. II 102-05; P. Ex. 456). The Liquidation Agreement acknowledged the relationship of trust and confidence between the parties; and confirmed Bateson's promise to share fully, completely, and without reservation, all information related to the claims. R. II

122, P. Ex. 459. In entering into this agreement with Crawford, Bateson continued to conceal Modification P00253, and its release of claims for additional time and money.[1] (R. II 123, Inters. Nos. 3(11), (13)).

In August 1984, after preparing and submitting a claim pursuant to the Liquidation Agreement, Crawford was told by the Corps that its portion of the "omnibus" claim was invalid in that it sought delay damages for claims released by P00253. This was the first time that Crawford learned of P00253, its release provisions, and its effect on the rephasing of project work. (R. II 147-51). Because of the release language, Crawford was unable to recover increased costs

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1/ In 1984, Bateson agreed with the Corps that all damages for time and money prior to January 23, 1980, were non-compensable. (P. Ex. 22).

from the Corps, and its business was destroyed.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY FAILING TO ACCORD PROPER DEFERENCE TO THE JURY FINDINGS AND THEREBY DEPRIVED CRAWFORD OF ITS SEVENTH AMENDMENT RIGHT OF TRIAL BY JURY.

The Seventh Amendment of the Constitution provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." This Court has firmly established the principle that an appellate court abuses its discretion when it fails to give proper deference to jury findings. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); Gallick v. Baltimore & Ohio R.R., Inc., 372 U.S. 108 (1963); Atlantic & Gulf Stevedores,

Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Tenant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 (1944).

The standard for appellate review of a jury finding is whether there is any competent and substantial evidence in the record which fairly tends to support the record. Mortensen v. United States, 322 U.S. 369, 374 (1944). Appellate Courts may not redetermine facts found by the jury. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359 (1962). This court, in elaborating on the standard for appellate review, stated:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable....

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944).

A. The Court of Appeals Disregarded the Jury's Findings and Substituted its own Findings of Fact.

In written interrogatories, the jury found Bateson liable for the following acts of fraud:

- Maintaining secret schedules of the project progress and directing the Corps not to disclose to subcontractors time extensions (Inter. Nos. 3(3), (15));
- Pursuing a Bateson corporate policy of keeping all time modifications secret from subcontractors (Inter. No. 3(5));
- Concealment by Bateson until August 1984 of P00253 which included a release of all claims and delays for the first 2-1/2 years of the project (Inter. Nos. 3(7), (9), (11), (17), (23));
- Failing to request quotations from Crawford for P00253 even though the rephasing extended completion dates by up to two years (Inter. No. 3(7));

- Failing to send any subcontractors time modifications to the prime contract (Inter. Nos. 3 (4), (5));

- Failing to send change order requests to Crawford when Bateson knew such changes affected Crawford's time and cost of performance (Inter. Nos. 3(2), (6));

- Misrepresentations by Bateson in 1982 that Bateson had made full disclosure of all facts relevant to the pursuit by Bateson and its subcontractors of a joint claim against the Corps for delays to the project (Inter. No. 13); and

- Concealing that the Corps sought to limit Crawford's recovery as a result of the release language executed by Bateson (Inter. No. 5).

In each instance, the jury found that Crawford had no knowledge of these tortious acts.

The jury found that Bateson breached its contract (Inter. No. 7) and was negligent (Inter. No. 13) by:

- Failing to coordinate the work of Crawford with the work of

other subcontractors (Inter. Nos. 7(B); 13(B);

- Failing to keep Crawford timely informed of all scheduling, rephasing and changes (Inter. Nos. 7(D); 13(D)); and

- Failing to consult with Crawford on changes which affected Crawford's work and failing to keep Crawford apprised of negotiations with the Corps for time or money relating thereto (Inter. Nos. 7(F); 13(F)).

The jury found that Bateson fraudulently concealed or induced Crawford to refrain from filing suit on the causes of action in subparts (D), (E) and (F) of Inter. Nos. 7 and 13.

The Fifth Circuit ignored all of these findings, and substituted its own factual determinations. For example, the Court rejected the jury's finding that Bateson concealed P00253 and its release language and that Crawford was damaged thereby. Instead the Court accepted a contention advanced by Bateson at trial,

and rejected by the jury: "P00253 did not change the construction; it only incorporated prior time extensions because of prior change orders." This conclusion ignores the plain language of P00253, substantial evidence in the record, and the jury's findings.

The jury found that Bateson's long standing policy of maintaining secret schedules and concealment of Corps approved time extensions defrauded Crawford. However, the Court of Appeals expressly condoned these deceptions. (Mem. Dec. p. 7).

The jury found affirmative misrepresentations on the part of Bateson. (Inter. No. 13). Yet the Court of Appeals opined that "no misrepresentation

was made...." (Mem. Dec. p. 9).[2]

The jury found that Bateson concealed a change in the electrical work, and that Crawford neither knew nor should have known of the change and its impact. (Inter. No. 6). The Court of Appeals adopted an argument advanced by Bateson at trial, and rejected by the jury, that

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2/ The jury also found that Bateson committed multiple acts of active concealment of material facts. (Inter. Nos. 3(3), (5), (15), (7), (9), (11), (17), (23); 5). Under Texas law, active concealment of a material fact constitutes a misrepresentation, without regard to a fiduciary relationship or duty to disclose. Campbell v. Booth, 526 S.W.2d 167 (Tex. Civ. App. 1975). The Court of Appeals disregarded the jury's findings, erroneously contending that the purported absence of a fiduciary relationship between the parties was fatal to Crawford's fraud claims. A partial, incomplete or erroneous disclosure will also give rise to a duty to disclose under Texas decisions: See Susanoil, Inc. v. Continental Oil Co., 519 S.W.2d 230 (Tex. Civ. App. 1975) (duty to disclose arises to correct one's prior misstatement); Southeastern

(Footnote 2 Continued on Next Page)

Crawford knew of the circumstances surrounding the change by 1977.

Similarly, the jury's answers to interrogatories relating to fraudulent concealment and estoppel to plead the statute of limitations were disposed of perfunctorily. The Court curtly contradicted the jury findings and found that Crawford was aware of changes in construction.

The Fifth Circuit not only violated this Court's long established precedent but also its own well established rule that an appellate court may not substitute its judgment for that of the jury.[3]

(Footnote 2 Continued From Previous Page) Financial Corp. v. United Merchants & Mfrs., 701 F.2d 565 (5th Cir. 1983) (duty to disclose the whole truth may arise from partial disclosure).

3/ Under the standard of appellate review in the Fifth Circuit, "[t]he verdict must be upheld unless the facts and inferences point so

(Footnote 3 Continued on Next Page)

Western Co. of N.Am. v. United States, 699 F.2d 264 (5th Cir. 1983), cert. denied, 104 S.Ct. 237 (1983).

Instead of determining whether there was competent and substantial evidence in the record which fairly tended to support the verdict, the court reweighed the evidence and arrived at its own verdict. By substituting its judgment for that of the jury's, the Court of Appeals improperly invaded the function and province of the jury thereby depriving Petitioner of its Seventh Amendment right to trial by jury.

(Footnote 3 Continued From Previous Page) strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary" (emphasis added). Western Co. of N.Am. v. United States, 699 F.2d 264 (5th Cir. 1983), cert. denied, 104 S.Ct. 237 (1983). Accord Park v. El Paso Board of Realtors, 764 F.2d 1053, 1059 (5th Cir. 1985).

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH ESTABLISHED PRECEDENT OF THE STATE OF TEXAS, THE FIFTH CIRCUIT, AND WITH THE VARIOUS CIRCUITS CONCERNING THE APPROPRIATE SCOPE OF A "NO DAMAGES FOR DELAY CLAUSE".

The Court of Appeals radically departed from the established precedent of several circuits, including prior decisions of the Fifth Circuit, by misconstruing a subcontract clause which is in wide use throughout the construction industry: a "no damage for delay" clause. The Court erroneously opined that all of Crawford's damages were delay damages,[4] and used the clause to set aside the jury's verdict.

4/ The Court ignored extensive evidence concerning Crawford's damages for increased labor and lost efficiency, and the Jury's express findings in Inter. Nos. 3(2), (6); 7(E), (F); 13(E), (F).

The Court failed to examine exceptions to the general application of "no damage for delay" clauses which have been widely recognized in other Circuits,[5] the Courts of Texas,[6] and by the Fifth Circuit's decision in E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 551 F.2d 1026, 1029 (5th Cir. 1977), reh'g denied in part, granted in part, 559 F.2d 268 (5th Cir. 1977); cert. denied, 434 U.S. 1067 (1978). In that case, the Court stated that these clauses were to be strictly construed against the party seeking to avoid liability, but would be enforced absent delay (1) not contem-

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5/ See United States Steel Corp. v. Missouri Pacific Railroad, 668 F.2d 435 (8th Cir. 1982).

6/ Shintech Inc. v. Group Constructors, Inc., 688 S.W.2d 144, 148 (Tex. App. 14 Dist. 1985); City of Houston v. R.F. Ball Const. Co., Inc., 570 S.W.2d 75 (Tex. Civ. App. 1978).

plated by the parties under the provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference. Id. at 1029. See Shintech, 688 S.W.2d at 148; City of Houston, 570 S.W.2d at 78.

In contrast to the jury deliberations,[7] the appellate court did not consider these exceptions in its evaluation of Crawford's damages. First, even assuming, arguendo, that the actions of Bateson did not amount to actionable fraud, its actions were sufficient to qualify under the misrepresentations or bad faith exception to the "no damages for delay" clause. Id. The jury found bad faith on the part of Bateson (Inter.

7/ The jury was properly instructed as to the contentions of the parties concerning the no damage for delay clause, and the applicable exceptions thereto.

Nos. 3, 8, 14), and this bad faith caused delay and resulting damage to Crawford.

Second, delay of 2-1/2 years could not have fallen within the contemplation of the parties at the time of contract. (R. IX 74-79). Third, Bateson's active interference through failure to coordinate the work, which the Court of Appeals recognized (Mem. Dec. at 7), caused delay. Finally, ample evidence, including expert testimony, was presented at trial to demonstrate that the delay was sufficiently extensive that Crawford would have been justified in abandoning the project. (R. II 132; IV 149; IX 78-79).

The Court grudgingly acknowledged that some of the delay on the project may have been attributable to Bateson's concealment of P00253 (Mem. Dec. at 10). Nevertheless, the court enforced the "no

damages for delay" clause, contending that the duty to coordinate and keep the subcontractor informed about the progress of the project was a contractual duty, and the violation of such a duty would not rise to the level of a tort claim even where the breach was "malicious and intentional." (Id., emphasis added).[8]

The Court inadvertently identified the very bad faith issue which it failed to address as an exception to the "no damage" provision. The Court stated that "[i]n fact, Crawford's position has been, and its present claim to the Corps is, that all of the delay was caused by the Corps." (Mem. Dec. at 11). While it was not Crawford's position that all of the delay was caused by the Corps, Bateson

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8/ The Court cited Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 571 (Tex. 1981) for this proposition. Amoco does not address these issues at all.

had effectively eliminated Crawford's ability to collect delay damages or any other kind of damages from the Corps for a large portion of the contract period. This bad faith action eliminated the applicability of the "no damage" provision to the contract in this instance. See City of Houston v. R.F. Ball Const. Co., 570 S.W.2d at 77.

III. THE COURT OF APPEALS' DETERMINATION THAT A PRIME CONTRACTOR ON A FEDERAL CONSTRUCTION PROJECT HAS NO DUTY TO DISCLOSE VITAL INFORMATION TO A SUBCONTRACTOR DEPARTS FROM ESTABLISHED PRECEDENT, CREATES A SPLIT AMONG THE CIRCUITS, AND GENERATES CONFUSION WITHIN THE CONSTRUCTION INDUSTRY.

A. The Decision of the Court of Appeals Generates Confusion in the Construction Industry and Erodes Confidence in the Administration of Federal Contracts.

The decision of the Court of Appeals has far-ranging implications for the construction industry. Expressly and by

implication, the Court has held that a prime contractor may:

(1) Keep its schedule for performance of project work secret, and abandon the scheduling requirements of the contract, without notifying its subcontractors;

(2) Conceal, and direct the government to conceal, all time extensions made to the prime contract, thus depriving the subcontractors of an opportunity to manage and schedule their own work to avoid delay and/or acceleration costs;

(3) Secretly agree to contract changes which extend a subcontractor's obligation by 2-1/2 years, without any consultation with the subcontractors; and

(4) Relinquish or impair, without notice, the long established right of subcontractors to submit claims for compensation to the contractor, and

through the contractor, to recover additional compensation for its increased costs from the government.[9]

The decision of the Court of Appeals generates needless confusion and uncertainty concerning the respective rights and obligations of parties to a construction contract. Moreover, the Court of Appeals has sanctioned a course of activity by a prime contractor which will create suspicion between the parties to a subcontract, and erode the public

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9/ This Court has specifically recognized the right of a subcontractor to submit claims to the general contractor, and through the general contractor, to the owner. United States v. Blair, 321 U.S. 730, 737-38 (1943); See also Owens Corning Fiberglas Corp. v. United States, 419 F.2d 439, 454-455 (Ct. Cl. 1969). The subcontractor is dependent upon the general contractor to preserve this right for there is no express or implied contract between the subcontractor and the Government. Blair, 321 U.S. 737-38.

confidence in the administration of Federal contracts.

B. The Court Of Appeals Created A Split Among The Circuits By Holding That A Prime Contractor May Keep Secret Schedules And Abandon the Scheduling Requirements of the Contract.

Decisions of the United States Claims Court and the United States Court of Appeals for the Federal Circuit have recognized that accurate and updated scheduling information is essential to the calculation of the true status of project progress. In G.M. Shupe, Inc. v. United States, 5 Cl.Ct. 662, 728 (1984), the Claims Court noted that the determination of the critical path of construction is crucial to the calculation of project delay. Id.

Similarly, in Fortec Constructors v. United States, 8 Cl.Ct. 490 (1985), aff'd, 804 F.2d 141 (Fed. Cir. 1986), the

United States Claims Court held that where a CPM schedule is mandated by the contract, the network analysis must be updated periodically in order to accurately reflect the status of the work or the progress being attained; and that in the absence of updated information, it is impossible to determine whether or not any particular work activity was or was not on schedule. 8 Cl. Ct. at 504-08.

In United States v. F.D. Rich Company, Inc., 439 F.2d 895 (8th Cir. 1971), the Court of Appeals for the Eighth Circuit found that where a prime contractor ordered changes in the sequence of work and dates for completion of phases of the work, without any prior consultation with the subcontractor, the changes were not binding upon the subcontractor. Id. at 900.

Because of the conflict among the various circuits generated by the decision of the Court of Appeals, this Court should exercise its power of supervision to resolve the conflict and to maintain stability in the construction industry.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the Court below.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. Memorandum Decision and Judgment dated August 10, 1988 Reversing and Rendering the Judgment of the United States District Court

B. Decision dated September 8, 1988 Denying Petition for Rehearing and Suggestion For a Rehearing En Banc

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

C. Order dated January 22, 1987 granting Plaintiff's Motion For Judgment

D. Judgment dated January 22, 1987

E. Order dated April 28, 1987, denying Defendant's Motion for New Trial, Altered Judgment, Remittitur and/or Judgment Notwithstanding the Verdict

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-5545

CRAWFORD PAINTING &
DRYWALL COMPANY,

Plaintiff-Appellee,

versus

J. W. BATESON COMPANY,
INC.,

Defendant-Appellant.

Appeal from the United States
District Court for
the Western District of Texas
(CA-SA-85-1082)

(August 10, 1988)

Before WISDOM, REAVLEY and POLITZ,
Circuit Judges.

REAVLEY, Circuit Judge:*

Claiming breach of contract, fraud, negligence and civil RICO violations, the subcontractor who lost money on a large construction contract has recovered over $7,000,000 by the district court's judgment. Finding no legal basis for a recovery, we reverse the judgment and dismiss the cause.

A. BACKGROUND

J. W. Bateson Co., Inc. executed a contract with the United States Army Corps of Engineers on September 19, 1976

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*/ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

to do extensive remodeling and new construction at Wilford Hall United States Air Force Area Medical Center in San Antonio, Texas. Bateson and Crawford Painting and Drywall Company executed a contract on March 14, 1977 for Crawford to do the drywall work for $2,164,000. Bateson, Crawford, and the other sixteen subcontractors encountered difficulties on this project from the beginning. Reliable drawings of the existing facilities were not available. Construction had to proceed around the continuing operation of a very large hospital. But the largest source of trouble was the great volume of change orders. As is so often the case, as the medical personnel and hospital administrators became conversant with the plans prepared by the Corps, the user insisted on modifications

which the Corps then required of the prime contractor. In the early stages of the construction, Bateson would receive as many as 20 change orders in a week. Though the scheduled completion date was originally July 30, 1981, the project was not finally completed until August 4, 1983.

One document, often discussed in this record and identified as P00253, was an agreement between Bateson and the Corps on April 19, 1979 to extend the time for the completion of the contract and its phases. By that agreement an additional 148 compensable work days were allowed to the contractors. Additional extensions were necessary before the actual completion.

Knowing that all of the subcontractors, as well as Bateson itself, were

entitled to pursue substantial claims for additional compensation against the Corps under the Contract Disputes Act, 41 U.S.C. §§ 601 et seq., Bateson brought all of the subcontractors together in the spring of 1982 for the purpose of collaborating on a joint claim. The parties signed what was called the Liquidation Agreement for that purpose, and they did file with the Corps a joint claim which covered the claims of each subcontractor and the prime contractor. Crawford executed these documents on October 28, 1982.

During the course of negotiations in early 1984 Bateson and the Corps agreed upon a certain number of extra compensable days of construction. That number was less than the number claimed in the

1982 documents. When Crawford was advised of this negotiated number, his investigation led him to believe that Bateson had released and cut off the subcontractors from any delay claim prior to the 1979 P00253 and that this was the cause of the reduction in compensable days which Bateson purported to agree upon in 1984. Crawford then revised its own claim and, after a delay to obtain an unqualified certification by Bateson for the Corps, the revised claim was finally accepted by the Corps. This claim has since been denied by the contracting officer of the Corps and is pending in the Court of Claims. See 41 U.S.C. § 609(a)(1).

Looking at the evidence in the worst light for Bateson, as we must do in the face of the jury verdict, Crawford was

left in the dark on requests and agreements between the Corps and Bateson to change and reschedule the work. By the time of the 1979 negotiations between owner and prime contractor, the latter was at some risk because of possible liability for liquidated damages due to the contractor's failure to meet the contract schedule. The jury was entitled to believe that, in negotiating with the Corps, Bateson's concern was not to protect the claims of Crawford so much as to care for its own position in the balance between its potential liability to the Corps and its own claims against the Corps.

Crawford filed this lawsuit against Bateson on March 28, 1985. Federal jurisdiction was predicated on civil RICO counts under 18 U.S.C. § 1964(c), and

other claims were made under state law for fraud, breach of contract, and negligence. The trial commenced on November 4, 1986 and concluded on December 22. It required 18 days of testimony and several boxes of exhibits. The tone of the trial was set by the opening statement of Crawford's attorney when he told the jury "that J. W. Bateson Co. abused and defrauded Mr. Crawford in the course of the construction of that project and caused Mr. Crawford to lose a business that it took him over 50 years to establish." He contended in this opening argument, as has been contended in all of the court papers and throughout the proceedings, that the case is marked by the "landmark of fraud, and it runs through this project just like the San Antonio River runs through San Antonio...."

Two witnesses, the son of the owner of the Crawford Company and a professor of economics, testified on Crawford's damages. But no evidence was submitted to relate any item of damage to specific acts or omissions of Bateson. These witnesses simply took all of Crawford's financial experience during the Wilford Hall project, including the collapse of the Crawford business, and added the losses together for very large totals. Johnny Crawford, for example, presented two different computations which he called his performance method and short-fall method. The performance method added together the same items claimed against the Corps for job delay, with very large costs of borrowing because of interest paid to banks for short term credit, the loss of the business, legal

and professional fees in the controversy and lawsuit with Bateson, and arrived at a total of $1,779,152.41. By the shortfall method he added all costs of Crawford in connection with the Wilford Hall project, together with 15% for administrative overhead and 10% for profit, plus the very large outlays for interest expense during these years. From this he deducted the $2,665,000 paid by Bateson for the project work, leaving total shortfall damages of $3,178,013. The economics professor computed damages by his "claims method" at $1,778,740.18 to which he added the interest costs for $3,659,958. In his shortfall computation he allowed for all of the profits on other jobs that Crawford would have made if it had not undertaken the Wilford Hall project, and added the other losses and

costs for total damages computed to be $5,085,658.

The jury was apparently impressed by plaintiff's presentation. Plaintiff failed only on its civil RICO claim. The jury found for the plaintiff on fraud, breach of contract, and negligence. The judgment of the trial court was based upon findings of $2,383,333.33 damages for fraud and an award of $4,000,000 punitive damages. Attorneys fees were awarded of $730,000.

It should be immediately apparent from the first reading of these briefs that the fraud award and the punitive damages cannot stand. What is not easy to determine, beneath the needlessly huge record and verbose argument, is the merit -- rather the lack of merit -- of specific legal claims. Our efforts in that

search are aided by turning to the verdict of the jury and considering each finding in favor of the plaintiff as it relates to the allegations in the plaintiff's Third Amended Complaint. That is the source of the outline we now follow.

B. **Plaintiffs Claims, The Jury Verdict, and Governing Law**

1. Fraud in the Administration of the Subcontract (Count VII in Plaintiff's Third Amended Complaint)

   a. Bateson maintained "secret schedules." There is evidence that Bateson did not always tell all of the subcontractors about time extensions for the construction or reveal Bateson's own schedule. We are not prepared to hold that a prime contractor cannot plan a construction schedule without making

full disclosure to every subcontractor. Schedules may be goals or may be deadlines. They may reflect dates that the Corps is yet to accept for some contract change. The subcontractor could conclude that the "schedule" permits him to delay work that he might otherwise have done earlier. The worse (sic) that could be said in connection with the failure to inform Crawford is that Bateson was failing to perform its obligation to coordinate the contract. A breach of this obligation would subject Bateson to liability if it were not for paragraph 9 of their contract which provided that Crawford could not recover an

increase in the contract price or damages due to delay caused by Bateson. See, E. C. Ernst, Inc. v. Manhattan Constr. Co. of Tex., 551 F.2d 1026, 1029 (5th Cir.), reh'g denied in part, granted in part, 559 F.2d 268 (5th Cir. 1977); cert. denied, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978). It should be emphasized that the duty to coordinate and to keep the sub-contractor informed about the progress of the project is a contractual duty, and a violation would not support a tort claim. Even if the breach were malicious and intentional, the claim could not arise above one based on the contract itself.

See Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 571 (Tex. 1981).

What is very clear is that no actionable fraud claim exists. Texas law establishes the following elements of actionable fraud: (1) a material representation; (2) the representation was false; (3) when it was made the speaker knew that it was false or made it recklessly without any knowledge of the truth but as a positive assertion; (4) he made it with the intention that it should be acted upon by the party; (5) the party acted in reliance upon the representation; (6) the party thereby suffered injury. Stone

v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977). Most, if not all, of those elements are lacking in the present case. No misrepresentation was made, and the failure to disclose information is not and cannot be common law fraud in Texas in the absence of a fiduciary relationship between the parties. See Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 669 (Tex. Civ. App. -- Dallas 1986, writ ref'd n.r.e.). Crawford contends that a fiduciary relationship existed at all times between these two parties. The argument is spurious. Nothing in this

record supports that claim except some expressions that the parties did trust and have confidence in each other. The same could be said, we can hope, about most of the people we deal with each day; but it does not follow that all of us are legal fiduciaries. Bateson and Crawford had a sophisticated business relationship and dealt with each other at arms length. There was no fiduciary relationship, no fiduciary duty, and no fraud. See Richman Trusts v. Kutner, 504 S.W.2d 539, 544-45 (Tex. Civ. App. -- Dallas 1973, writ ref'd n.r.e.).

b. Bateson concealed and failed to transmit to Crawford for pricing

purposes a change in construction that allowed the installation of electrical conduit outside of the floor or ceiling slabs. The consequence of this modification in the construction impeded Crawford's workers and caused them some delay. What was said above applies to this matter, a dispute that wasted many hours in the trial of this case. In addition, the change was fully known to the Crawford personnel as early as 1977. Any claim for damages would have been barred by limitations.

c. Bateson's concealment of P00253. There are two different considerations here. The first is the rephasing or extension of the

contract as a result of this agreement between the Corps and Bateson in 1979, which Crawford did not see until 1984. P00253 did not change the construction; it only incorporated prior time extensions because of prior change orders. We fail to see any effect of this agreement upon Crawford, but if there was any relation to Crawford's work, it would be by causing some extra delay. It must be recognized that the only factor about this job which Crawford claims to have caused it damages was delay. Crawford has many complaints of omissions that led to delay. It may have suffered financial reverses as a result

of the delay. But the critical factor and only factor that did the damage was delay. The remarkable part of this picture is that, at this late date, Crawford has presented no proof that Bateson contributed to some degree to the job delay. In fact, Crawford's position has been, and its present claim to the Corps is, that all of the delay was caused by the Corps.

Furthermore, any rearrangement or scheduling, if P00253 did affect the work itself, was known by Crawford's people working on the job long prior to March 28, 1981, the bar date of the statute of limitations.

The other contention relative to P00253 is that the document itself withdrew all of Bateson's prior protests on price modifications and released all claims for increased costs for prior delay caused by the Corps. This contention ignores the fact that the Bateson representative in executing P00253 referred to his attached letter by which Bateson specifically reserved all rights for increased costs for prior delay. Crawford argues that in the settlement with the Corps in 1985 Bateson concedes the binding release of P00253. The 1985 settlement does not change the effect of the 1979 documents and

it expressly provides that it does not affect the claim of Crawford against the Corps.

2. Breach of the Liquidation Agreement and Fiduciary Relationship (Count V of Plaintiff's Third Amended Complaint)

a. Bateson concealed the contents of P00253 from Crawford until August of 1984. Bateson concedes that a fiduciary relation was established by the Liquidation Agreement after June 15, 1982 in the course of the joint effort to present the claim to the Corps. The duty did therefore exist to reveal to Crawford this document insofar as it affected the compilation of information for presentation of the claim to the Corps. This

effect upon Crawford is entirely different from job delay and the release contention discussed above.

b. Bateson misrepresented in 1982 that it had made a full disclosure of all facts relevant to its claim against the Corps.

c. Bateson concealed from Crawford the fact that the Corps took the position in its negotiations with Bateson that all claims for costs due to delay prior to 1979 had been released by P00253.

All of the above three items may be assumed to have had an effect upon Crawford insofar as it was preparing and presenting its claim to the Corps. Again, this has nothing to do

with delay or expenses in the performance of the contract. At most, Crawford was delayed in processing its claim and went to greater expense in the preparation of its revised claim because of the failure to disclose by Bateson. However, plaintiff has not alleged or proved damages of this nature.

Items (a) and (b) above were within the jury's specific findings of fraud for which total damages of $2,383,333.33 were assessed. A separate issue (c. above) was submitted to the jury by which it was found that Bateson concealed the Corps position. The jury then found damages as the result of this

concealment to be $30,000. Perhaps the jury tried to manufacture a figure for damages that would be related to this particular nondisclosure. Again, plaintiff did not seek these limited damages and made no proof at all of its outlays for this reason.

3. Breach of Contract (Count II in Plaintiff's Original Complaint)

   a. Bateson failed to keep Crawford informed of scheduling and pricing changes.

   b. Bateson failed to request that Crawford submit its pricing to make change orders.

   c. Bateson failed to consult Crawford on change orders.

These failures damaged Crawford only because of the delay, for which the contract does not permit Crawford to recover damages against Bateson. This was explained above. In addition, these claims are all barred by limitations. The jury found that each of the omissions occurred prior to March 28, 1981. The jury also found that Bateson was guilty of fraudulent concealment of this conduct. The significance of this finding is supposed to effect the postponement of the running of limitations. The evidence in this case will not support the fact finding or Crawford's position. "The estoppel effect of

fraudulent concealment ends when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action. Knowledge of such facts is in law equivalent to knowledge of the cause of action." Borderlon v. Peck, 661 S.W.2d 907, 909 (Tex. 1983). Crawford knew all of these changes as they were made on the job itself. Crawford knew who was dealing with the Corps and how the change orders were made and, though it may not have known of the paperwork, Crawford personnel certainly knew of the construction itself.

4. Negligence (Count IV of Plaintiff's Original Complaint)

The jury found the very same acts or omissions to be negligent as are set forth above as the three breach of contract violations. The jury also made the same findings with reference to limitations -- that the failures occurred prior to March 28, 1983 (there being a two year statute applicable to negligence) but that Bateson was guilty of fraudulent concealment. What was said above with reference to the breach of contract claim applies here. In addition, the negligence cause of action should be disregarded because these obligations are all determined by the contract and are contractual in nature. See Alexander, 622 S.W.2d at 571.

Conclusion

We conclude that Crawford has failed to establish any liability of Bateson. The judgment of the district court is reversed and judgment is here rendered dismissing the cause of action.

REVERSED AND RENDERED.

APPENDIX B

RECEIVED SEP 12 1988

U.S. COURT OF APPEALS
FILED
SEP 8 1988
GILBERT E. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5545

CRAWFORD PAINTING & DRYWALL COMPANY,

Plaintiff-Appellee,

versus

J. W. BATESON COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 10, 5 Cir., 1988, _____ F.2d _____)

(SEPTEMBER 8, 1988)

Before WISDOM, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-6

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX C

FILED
JAN 22 1987
CHARLES W. WAGNER, Clerk
By Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

CRAWFORD PAINTING & DRYWALL COMPANY,	*	
Plaintiff-Appellee,	*	
VS.	*	SA-85-CA-1082
J. W. BATESON COMPANY, INC.,	*	
Defendant-Appellant.	*	

O R D E R

On this day came on to be considered the respective motions of plaintiff and defendant for judgment as well as the responses thereto. The jury found liability and damages on plaintiff's causes of action for fraud, breach of contract

and negligence, and also awarded attorneys' fees. Plaintiff seeks entry of a judgment cumulating all of these damages plus prejudgment interest. The jury also answered two issues concerning a Liquidation Agreement and Lien Waiver Forms, which answers defendant contends require entry of judgment in its favor. Having thoroughly reviewed the argument of counsel, the interrogatories to the jury, and having reexamined the Liquidation Agreement and Lien Waiver Forms, the Court is of the opinion that judgment should be entered in favor of plaintiff.

Interrogatory number one asks the jury to determine from a preponderance of the evidence whether the Liquidation Agreement and Lien Waiver Forms were signed by Crawford because of fraud by Bateson. The jury determined that they

were not. Plaintiff argues that because the interrogatory was phrased in the conjunctive, that the jury's negative answer indicates only that one of the documents was not signed because of defendant's fraud, allowing an inference that the signature to the other document was induced by fraud. Neither plaintiff nor defendant nor the jury has previously indicated any confusion about the meaning of the first interrogatory. The language is clear and not subject to different interpretations. The Court has no intention of inferring that the jury found fraudulent inducement as to any of the instruments. The Court also rejects plaintiff's argument that by answering interrogatory number two "Partial Release", the jury determined that defendant remained liable for its own acts and

omissions. That is not what the question says. Reading the relevant instructions in conjunction with the interrogatory leads to the conclusion that by finding "Partial Release", the jury determined that Bateson would only be liable for money recoverable from the Corps of Engineers or for Corps-caused problems, and would not be liable for any of its own acts or omissions. In its third set of proposed instructions, plaintiff proposed that the jury be instructed as follows:

> "Mr. Crawford contends that they [the Liquidation Agreement and Lien Waiver Forms] are, only effective if at all, to release Bateson from liability in excess of what is recoverable from the Corps or Corps-caused problems and that Bateson remains presently liable for wrongs it, not the Corps committed."

At the informal charge conference, counsel for plaintiff agreed to the wording in interrogatory numbers one and two which was ultimately submitted to the jury. The affidavit of Mr. Wickwire is erroneous and misleading in this respect. It indicates that plaintiff made specific objections and requests which were rejected by the Court at the charge conference. As Mr. Wickwire well knows, only my law clerk, not this judge, attended the informal charge conference. He was neither authorized to nor, as determined from my conversations with him, did he reject any request by plaintiff as to these two interrogatories. The fact that plaintiff concurred in the language submitted is established by the fact that no objection to either interrogatory was made on the record by plaintiff at the

time formal objections to the charge were taken.

Despite the fact that the Court must reject plaintiff's contentions concerning the meaning of interrogatory number one and number two of their answers, the Court is of the opinion that these instruments do not preclude plaintiff's recovery. The Liquidation Agreement, signed June 15, 1982, between defendant and its subcontractors on the Wilford Hall project provides for the presentation of their claims jointly to the Corps for additional compensation. Paragraph seven provides that Bateson and the subcontractors signing the agreement agreed to waive any right each may have against the other arising out of any facts constituting the basis of the claim presented to the Corps other than as to

monies collected from the Corps on such claims. The paragraph goes on to state that the waivers do not affect the rights of the parties under the subcontracts now existing between them as to performance, warranties, progress payments, balance of contract price, performance and payment bonds, retention, changes and extras ordered by the Corps. It also provided that the agreement does not apply to other claims for extras, changes or other types of claims against the Corps which are already covered by provisions under the subcontracts then existing. Having examined the jury's answers to the interrogatories, the Court is of the opinion that the Liquidation Agreement was not intended to and does not release defendant from liability for the fraud, breach of contract, and negligence found by the

jury. The acts found by the jury to be wrongful concern performance as well as changes and extras under the subcontract. The Court also believes that defendant's wrongful breach of the Liquidation Agreement precludes its reliance upon the release provision. See, Sterling Projects, Inc. v. Fields, 530 S.W.2d 602, 606 (Tex. Civ. App. - Waco 1975). The jury found that defendant breached the Liquidation Agreement by failing to disclose in 1983 and 1984 that the Corps of Engineers sought to limit recovery by Crawford as a result of the release language contained in P00253. The jury's finding in subpart 13 of the interrogatory number three that Bateson committed fraud in misrepresenting in the spring and fall of 1982 that it made full disclosure with respect to all the facts relevant to the

claim, violates paragraph 1 of the Liquidation Agreement which requires Bateson to fully and completely and without reservation share all information and records with Crawford. Having breached its obligations under the Liquidation Agreement, Bateson is now precluded from relying upon plaintiff's release.

Neither can the Lien Waiver Forms preclude recovery. These forms provided that in consideration of the payment to Crawford of progress payments by Bateson, Crawford would release and forever discharge Bateson from all claims, demands, liabilities and causes of action of every character whatsoever arising out of or in connection with the subcontract or any work performed by the subcontractor on the project through the date on the form.

It is well-settled that a release executed in exchange for payment of amounts admittedly due lacks consideration. Isthmian Lines, Inc. v. Haire, 334 F.2d 521, 523 (5th Cir. 1964). Laws v. Parker Petroleum Company, 237 S.W.2d 398, 405 (Tex. Civ. App. - Austin), rev'd 150 Tex. 430, 242 S.W.2d 164 (1951). Since, by paying the progress payments to Crawford, Bateson was only doing what it was contractually bound to do, such payments cannot constitute consideration for a release. The question of the effect of a release is one of legal construction and, therefore, a question of law. Hicks v. Wright, 564 S.W.2d 785, 798 (Tex. Civ. App. - Tyler 1978, writ ref. n.r.e.). This Court concludes as a matter of law that neither the Liquidation Agreement nor the Lien Waiver Forms operated to

release defendant from liability for the wrongful acts and omissions it committed.

Although plaintiff now requests cumulation of all of its damages under every cause of action, the Court does not feel that this would be appropriate. Both the breach of contract cause of action and the negligence cause of action contain the identical actual issues, and the jury found the same violations under each one. It also appears that the omission which constituted a breach of the Liquidation Agreement was also found by the jury to be fraudulent. The Court will therefore award damages as assessed for defendant's fraudulent conduct and defendant's breach of contract only. The breach of contract damages shall be reduced by 25% in accordance with the jury's answer to interrogatory number twelve.

Defendant contends that in interrogatory number three the jury found a limitations bar to five of the fraudulent acts or omissions but awarded damages for all fraudulent acts. Since defendant failed to object to the charge on this basis and failed to request an instruction that the jury not consider damages barred by limitations, defendant has waived its right to complain that the jury did not allocate damages between barred and non-barred claims. Defendant also challenges plaintiff's demand for pre-judgment interest, claiming that at trial the cost of borrowing was a major component of plaintiff's damages. The Court believes that the interest which plaintiff paid out for borrowed money and which constituted damages awarded by the jury is separate and distinct from pre-

judgment interest. The latter is meant to compensate a plaintiff for the loss of use of his money. The interest paid by plaintiff to the bank is money plaintiff would not have expended but for defendant's wrongful conduct. The pre-judgment interest is intended to compensate plaintiff for interest he would have received on the money owed by Bateson had Bateson paid the money. Plaintiff suggests an accrual date for the pre-judgment interest of August 16, 1984, the date of discovery by Crawford of the content of P00253 and the Corps' position that it effected a release. Since it appears that plaintiff sustained damage as of that date, pre-judgment interest shall be calculated from then.

It is, therefore, ORDERED that plaintiff's motion for entry of judgment be, and it hereby is, GRANTED.

It is further ORDERED that defendant's motion for judgment on the jury verdict be, and it hereby is, DENIED.

SIGNED this ____ day of January, 1987.

_____
H.F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
JAN 22 1987
CHARLES W. VAGNER, Clerk
By /ss/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

CRAWFORD PAINTING & DRYWALL COMPANY,	*	
Plaintiff-Appellee,	*	
VS.	*	SA-85-CA-1082
J. W. BATESON , COMPANY, INC.	*	
Defendant-Appellant.	*	

J U D G M E N T

In accordance with the verdict of the jury and the Order of the Court being entered contemporaneously herewith;

It is ORDERED that plaintiff Crawford Painting and Drywall Company recover of and from defendant J. W. Bateson Company,

Inc. the sum of two million six hundred and eight thousand three hundred thirty-three dollars and thirty-three cents ($2,608,333.33) plus pre-judgment interest on this amount at the rate of 10% per annum from August 16, 1984 to the date of this judgment, plus punitive damages in the sum of four million dollars ($4,000,000.00), plus attorneys' fees in the sum of seven hundred and thirty thousand dollars ($730,000.00), plus post-judgment interest at the rate of 5.75% and costs of court.

SIGNED this ____ day of January, 1987.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
APR 28 1987
CHARLES W. VAGNER, Clerk
By /s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

CRAWFORD PAINTING & DRYWALL COMPANY,	*	
Plaintiff-Appellee,	*	
VS.	*	SA-85-CA-1082
J. W. BATESON , COMPANY, INC.	*	
Defendant-Appellant.	*	

O R D E R

On this day came on to be considered the motions of defendant J. W. Bateson Company, Inc. for new trial, altered judgment, remittitur and/or judgment notwithstanding the verdict, and plaintiff's response thereto. The Court has

reviewed each contention in each motion. Many of the matters concern issues previously decided by written order. Other allegations involve purported jury answer inconsistencies and evidentiary sufficiency, and have been considered and are overruled. Defendant has requested a remittitur of punitive damages based upon what it considers is an appropriate reduction of actual damages. Since the actual damages will not be reduced, no remittitur will be ordered. Plaintiff's motion for sanctions for defendant's alleged violation of Rule 11, Fed. R. Civ. P., in the presentation of post-trial motions, is as meritless as are those motions.

It is, therefore, ORDERED that defendant's motions for new trial, altered judgment, remittitur and/or judgment

notwithstanding the verdict, and plaintiff's motion for sanctions be, and they hereby are, DENIED.

SIGNED this ____ day of April, 1987.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE